Public Prosecutor v Syarikat Tekala Sdn Bhd

HIGH COURT (SANDAKAN) — SUIT NO TS(87)160/98
LINTON ALBERT JC
26 MAY 2004

Criminal Procedure — Prosecution — Commencement of prosecution — Institution and conduct of prosecution — Whether criminal proceedings instituted and conducted properly — Whether institution and conduct of prosecution ultra vires art 145(3) of Federal Constitution

The respondent was charged for offences under s 43(2) of the Employees Provident Fund Act 1991 ('the Act'). During the defence stage, a preliminary objection was taken up by the respondent's counsel. The learned magistrate ruled that the institution and conduct of the prosecution against the respondent was ultra vires art 145(3) of the Federal Constitution. The prosecution is now appealing against the decision of the learned magistrate. The issue is whether the institution and conduct of the proceedings in respect of the charges against the respondents was a nullity. The DPP stated that the criminal proceedings were properly instituted upon the basis that the learned magistrate had taken cognisance of the offence under s 128 of the Criminal Procedure Code ('CPC').

Held, dismissing the appeal:

(1) The complaint lodged by the officer of the EPF Board preceded the cognisance by the magistrate of the offence for which the respondents were charged. It follows that the complaint itself constitutes the institution of the proceedings against the respondents and not the cognisance by the magistrate. The magistrate cannot, therefore, be said to have instituted the proceedings (see para 4).

(2) The proceedings against the respondents were instituted and conducted by the officers of the EPF Board and founded on s 68 of the Employees Provident Fund Act 1991 ('the Act') (which had since been repealed by Act 1080/00) and of s 380(ii)(b) (before its amendment on 1 April 1998) of the CPC. From the authorities cited by counsel for the respondent, that s 68 of the Act and the old s 380(ii)(b) were unconstitutional (see paras 9 and 13).

(3) It was of no assistance to the appellant that the officers of the EPF Board were given written authorization to conduct the prosecution of the respondent on 4 March 1999, before the trial began on 15 March 1999. In the first place, the institution of the proceedings having been declared void, everything that follows would invariably have suffered the same fate. Significantly, the written authorization was given after the amendment to s 377 of the CPC that came into force on 1 April 1998 and it is, therefore, apparent that the amended s 377 of the CPC pursuant to which the written authorization was given was irrelevant (see para 21).

[Bahasa Malaysia summary

Responden telah dituduh dengan kesalahan-kesalahan di bawah s 43(2) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta tersebut'). Pada masa pembelaan, satu bantahan awal telah dibuat oleh peguam responden. Majistret yang arif telah membuat keputusan bahawa pemulaan dan pelaksanaan pendakwaan terhapap responden adalah ultra vires perkara 145(3) Perlembagaan Persekutuan. Pihak Pendakwaan sekarang merayu terhadap keputusan majistret yang arif itu. Isu adalah sama ada pemulaan dan pelaksanaan prosiding mengenai pertuduhan-pertuduhan itu adalah tak sah. Timbalan Pendakwa Raya ('TPR') telah berkata bahawa prosiding jenayah ini telah dimulakan dengan betul pada dasar majistret yang arif telah mengambil tahu kesalahan itu di bawah s 128 Kanun Acara Jenayah ('KAJ').

Diputuskan, menolak rayuan itu:

(1) Aduan yang dibuat oleh pegawai Lembaga KWSP telah berlaku sebelum majistret mengambil tahu kesalahan yang responden dituduh. Oleh itu, aduan itu menjadi pemulaan prosiding terhadap responden dan bukan ambil tahu oleh majistret. Majistret itu tidak dapat dikatakan memulakan prosiding itu (lihat perenggan 4).

(2) Prosiding terhadap responden telah dimulakan dan dilaksanakan oleh pegawai-pegawai Lembaga KWSP dan berasaskan s 68 Akta (yang telah dimansuhkan oleh Akta 1080/00) dan s 380(ii)(b) (sebelum pindaan pada 1 April 1998) KAJ. Daripada otoriti yang dikemukakan oleh peguam respondenf, s 68 dan s 380(ii)(b) yang lama adalah tidak berperlembagaan (lihat perenggan 9 dan 13).

(3) Ia tidak dapat menolong perayu bahawa pegawai-pegawai Lembaga KWSP telah diberi kebenaran bertulis untuk melaksanakan pendakwaan responden pada 4 Mac 1999, sebelum perbicaraan bermula pada 15Mac 1999. Pertamanya, pemulaan prosiding telah diisytiharkan tak sah, dan segala yang selepas itu juga tak sah. Yang penting, kebenaran bertulis telah diberi selepas pindaan kepada s 377 KAJ berkuatkuasa pada 1 April 1998 dan oleh itu, ia jelas bahawa s 377 yang dipinda yang memberi kebenaran bertulis itu tidak relevan (lihat perenggan 21).]

Notes

For cases on commencement of prosecution, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2555.

For commencement of proceedings before a magistrate's court, see 18 *Halsbury's Laws of Malaysia*, para [310.291].

Cases referred to

Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1 (refd)

Nguang Chan Sdn Bhd v Public Prosecutor [2001] 2 MLJ 129 (refd)

PP v Dato' Yap Peng [1987] 2 MLJ 311 (dist)
PP v Lee Ming & Anor [1998] 4 MLJ 113 (refd)
PP v Lim Shui Wang & Ors [1979] 1 MLJ 65 (refd)
Repco Holdings Bhd v Public Prosecutor [1997] 3 MLJ 681 (refd)

Legislation referred to

Criminal Procedure Code ss 128, 377, 380(ii)(b), 418A
Employees Provident Fund Act 1991 ss 43(2), 68
Federal Constitution arts 4(1), 5(1), 121(1), 145(3)
Securities Commission Act 1993 s 39(2)

Duncan Sikodol (Deputy Public Prosecutor, Attorney-General's Chambers) for the appellant.
N Sivabalah (Lim Chi Wu with him) Shearn Delamore & Co for the respondent.

Linton Albert JC:

[1] The respondent was charged for offences under s 43(2) of the Employees Provident Fund Act 1991 ('the Act'). The trial before the learned magistrate was cut short at the defence stage, when on a preliminary objection taken up by the respondent's counsel, Mr N Sivabalah, the learned magistrate ruled that the institution and conduct of the prosecution against the respondent was ultra vires art 145(3) of the Federal Constitution. The Prosecution is now appealing against the decision of the learned magistrate. It is probably useful to begin by setting out the facts relevant for the determination of this appeal.

[2] A summons was issued against the respondent on 12 March 1998 relating to three charges under s 43(2) of the Act and an additional four charges were included at the trial on 15 March 1999 under the same section of the Act. All the charges related to offences alleged to have been committed before April 1998. The charges against the respondent arose from a complaint lodged on 10 March 1998 by the Employees Provident Fund Board ('the EPF Board') through one Margaret Soon Siew Kyun, an officer of the EPF Board. The trial which commenced before the learned magistrate on 15March 1999 was also conducted by the officers of the EPF Board. The issue, therefore, is whether the institution and conduct of the proceedings in respect of the charges against the respondents was a nullity.

[3] Learned Deputy Public Prosecutor ('DPP'), M Duncan Sikodol contended that criminal proceedings against the respondents was properly instituted on the basis that the learned magistrate had taken cognisance of the offence under s 128 of the Criminal Procedure Code ('CPC') which reads as follows:

(1) Subject to this code a Magistrate may take cognisance of an offence:-
(a) upon receiving a complaint as defined by this code;
(b) …
(c) …
(d) …

[4] Clearly, the complaint lodged by the officer of the EPF Board preceded the cognisance by the magistrate of the offence for which the respondents were charged. It follows that the complaint itself constitutes the institution of the proceedings against the respondents and not the cognisance by the magistrate. The magistrate cannot, therefore, be said to have instituted the proceedings. Suffian LP in *Public Prosecutor v Lim Shui Wang & Ors* [1979] 1 MLJ 65 at p 67 defined the word 'institute' in art 145(3) of the Federal Constitution thus:

> The word 'institute' means to set on foot, initiate, start, so that the Attorney-General has power, at his discretion, to initiate a case such as the present ones, …

[5] In *Nguang Chan Sdn Bhd v Public Prosecutor* [2001] 2 MLJ 129 at p 141, Lamin PCA had this to say:

> However by lodging a complaint as was done by the assistant controller, did not help to salvage the case in any way. By so doing it could be said he did institute the proceedings.

[6] I do not feel compelled to follow, as learned DPP would want me to, the contrary view expressed in *Public Prosecutor v Dato' Yap Peng* [1987] 2MLJ 311 where at p 323, Mohamed Azmi SCJ stated that:

> Criminal proceedings are in fact not instituted until the court has taken cognisance of the offence or offences under one or other of the clauses of subsection (1) of Section 128 CPC [Criminal Procedure Code] … .

[7] Dato' Yap Peng revolved around the constitutional validity of s 418A of the CPC in relation to arts 121(1) and 5(1) of the Federal Constitution. The passage set out above was a passing remark made by Mohamed Azmi SCJ in response to the learned DPP's misplaced reliance in that case on art 145(3) of the Federal Constitution.

[8] Dato' Yap Peng is, therefore, totally distinguishable from the matter before me. The ratio decidendi of the majority decision was that the judicial power conferred on the Attorney-General to transfer a case from a subordinate court of competent jurisdiction to the High Court under s 418A of the CPC was in violation of art 121(1) of the Federal Constitution and was, therefore, unconstitutional and void under art 4(1).

[9] There is no doubt that the proceedings against the respondents was instituted and conducted by the officers of the EPF Board and founded on s 68 (which had since been repealed by Act 1080/00) of the Act and of s 380(ii)(b) (before its amendment on 1 April 1998) of the CPC. They read as follows. Section 68 of the Act:

> Prosecutions in respect of any offence against this Act or of any regulations or rules made thereunder may be conducted by any officer authorized in writing in that behalf of the Chairman.

[10] Section 380(ii)(b):

> Notwithstanding anything in this Chapter contained —
>
> (ii) in summary non seizable cases in the court of a Magistrate -

(a) …

(b) any officer of any Government department or to any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce.

[11] The constitutional validity of these two sections was challenged by the respondent as being inconsistent with art 145(3) of the Federal Constitution and, therefore, void by virtue of art 4(1). They read as follows:

145(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial.

[12] Article 4(1):

This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[13] It is clear, from the authorities cited by learned counsel for the respondent, that s 68 of the Act and the old s 380(ii)(b) were unconstitutional. In *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681, Gopal Sri Ram JCA declared s 39(2) of the Securities Commission Act 1993 ('SCA') to be void and unconstitutional as it wholly contravened art 145(3) of the Federal Constitutional. Section 39(2) of the SCA reads as follows:

(2) Any officer of the Commission authorized in writing by the Chairman may conduct any prosecution of any offence under this Act.

[14] The position of the Chairman of the EPF Board in s 68 of the Act is akin to that of the Chairman of the Securities Commission in s 39(2) of the SCA. It is useful, therefore, to reproduce the relevant passages of his Lordship's judgment. They are:

[15] At p 687:

It will be seen at once, from a reading of the plain language of art 145 (3) , that the supreme law, namely the Federal Constitution, has committed to the hands of the Attorney General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

[16] And at p 690:

Neither does s 380(i) of the [Criminal Procedure Code] CPC, relied on by the prosecutors before the sessions court, provide any assistance to the Securities Commission. As pointed out by the learned deputy public prosecutor, the expression 'public officer' appearing in that section refers to members of the public service. While for the purpose of carrying out their duties, members and servants of the Securities Commission are deemed to be public officers [s 40 of the SCA], they do not fall within the scope of s 380(i) of the CPC.

[17] The second authority cited by the Mr N Sivabalah was *Public Prosecutor v Lee Ming & Anor* [1998] 4 MLJ 113 where at p 120, Ian Chin J had this to say:

> It is clear from the wording of s 380 (ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v PP* that s 380(ii)(b) is also unconstitutional and a nullity.

[18] The third authority brought to my attention was the Court of Appeal Case of *Nguang Chan Sdn Bhd v PP* where Lamin PCA delivering the judgment of the court said at p 135:

> The constitutional validity of this provision is questionable especially when the section (s 380 of the CPC [Criminal Procedure Code]) if prefixed with the words 'Notwithstanding anything in this Chapter contained …'. The effect of this is to oust the powers of the Attorney-General under s 376(i) of the CPC to control and direct all criminal prosecutions. Perhaps this is permissible. But more importantly it stands in the face of his general powers under art 145(3) of the Federal Constitution and will immediately attract art 4(1) of the Constitution.

[19] Learned DPP cited a passage at p 122 of the judgment of Ian Chin J in *PP v Lee Ming & Anor* where his Lordship expressed reservations as to the correctness of *Repco Holdings Bhd v Public Prosecutor*:

> The conclusion of *Repco Holdings Bhd v PP* can only be sustained if the word 'only' is added to make the relevant part of the clause to read: 'Only the Attorney General shall have the power ...' or the word 'sole' is added so that it reads: 'The Attorney General shall have the *sole* power … .' In my view, that the word 'only' or 'sole' is missing is demonstrative of the clear intention of the framers of the Constitution that the Federal Attorney General should not be the sole or any person to institute, conduct or discontinue any proceedings for an offence.

[20] That passage does not, in my view, warrant a departure from *Repco Holdings Bhd v Public Prosecutor* as the learned DPP would have wanted because his lordship, despite having said that, did not go on to differ. Indeed, I must also be mindful, as learned counsel for the respondent urged, of what was said by Peh Swee Chin FCJ in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 at p 12:

> The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal.

[21] It is of no assistance to the appellant that the officers of the EPF Board were given written authorization to conduct the prosecution of the respondent on 4 March 1999, before the trial began on 15 March, 1999. In the first place, the institution of the proceedings having been declared void, everything that follows would invariably suffer the same fate. Significantly, the written authorization was given after the amendment to s 377 of the CPC came into force on 1 April 1998 and it is, therefore, painfully apparent that the amended s 377 of the CPC pursuant to which the written authorization was given is irrelevant.

[22] In the light of the authorities I have discussed and set out above I am of the view that the decision of the learned magistrate was correct, and therefore, the proceedings against the respondents was null and void. The appeal is dismissed.

Appeal dismissed.

Reported by Chew Phye Ken